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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

TATIANA OLMOS, individually and
on behalf of all others similarly
situated,

Plaintiff,

v.

BANK OF AMERICA, N.A., a
national bank, f/k/a FIA CARD
SERVICES, N.A., a national bank,

Defendants.

Case No. 15-cv-02786-BAS-BGS

**SECOND AMENDED CLASS
ACTION COMPLAINT AND JURY
DEMAND**

Hon. Cynthia Bashant

Magistrate Judge Bernard G. Skomal

1 Plaintiff Tatiana Olmos brings this Second Amended Class Action Complaint
2 and Jury Demand (“Complaint”) against Defendant Bank of America, N.A., f/k/a
3 FIA Card Services, N.A. (“BOA”) to seek redress for its sending of unsolicited text
4 messages in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227
5 (the “TCPA”), and the California Rosenthal, Act, Cal. Civ. Code §§ 1788 *et seq.*
6 (the “CRA”). Plaintiff alleges as follows upon personal knowledge as to herself and
7 her own acts and experiences, and, as to all other matters, upon information and
8 belief, including investigation conducted by her attorneys.

9 NATURE OF THE ACTION

10 1. BOA, a large national bank, operates millions of credit card accounts
11 for consumers across the country. Many of these accounts are associated with
12 BOA’s former credit card subsidiary, FIA Card Services, N.A. Collectively, these
13 accounts have hundreds of billions of dollars’ worth of outstanding balances.

14 2. BOA routinely contacts its account holders through telephone calls and
15 text messages, usually at the telephone numbers they provide. But when a provided
16 number does not work, BOA will find a new one on its own—a number that it
17 necessarily lacks express consent to call.

18 3. Unfortunately, as a result, BOA regularly sends text messages to
19 cellphone numbers, without consent, in violation of the TCPA.

20 4. The TCPA strictly forbids nuisance calls exactly like those alleged in
21 this Complaint—intrusive text messages to private cellphones, placed to numbers
22 obtained without the prior express consent of the call recipients.

23 5. BOA’s violations caused Plaintiff and a Class and Subclass of
24 consumers (defined below) actual harm, including the aggravation, nuisance, and
25 invasion of privacy that necessarily accompanies the receipt of unsolicited text
26 messages, as well as the violation of their statutory rights.

27 6. In response to Defendant’s unlawful conduct, Plaintiff brings the
28 instant lawsuit and seeks an injunction requiring Defendant to cease all unsolicited

1 phone call activities, an award of statutory damages, restitution of lost money or
2 property, costs, reasonable attorneys' fees, and a declaration that Defendant's
3 conduct violates the TCPA and CRA.

4 **PARTIES**

5 7. Plaintiff Tatiana Olmos is a natural person and citizen of the State of
6 California and resident of San Diego County, California.

7 8. Defendant BOA is a national bank with headquarters at 1100 North
8 Tryon Street, Suite 170, Charlotte, North Carolina 28202. It regularly transacts
9 business in the State of California and throughout the United States.

10 **JURISDICTION AND VENUE**

11 9. This Court has subject matter jurisdiction under 28 U.S.C. § 1331, as
12 this action arises under the TCPA, which is a federal statute. This Court has
13 supplemental jurisdiction over Plaintiff's state law claims under 28 U.S.C. § 1367(a)
14 because those claims are so related to her federal claims that they form part of the
15 same case or controversy under Article III of the United States Constitution.

16 10. This Court has personal jurisdiction over Defendant because it
17 routinely transacts business within this District, including sending text messages to
18 and collecting payments from residents of this District. Additionally, the specific
19 conduct giving rise to this case was directed to a resident of this District.

20 11. Venue is proper in this District under 28 U.S.C. § 1391(b) because
21 Defendant routinely transacts business within this District and sends text messages
22 and collects payments from residents of this District. Moreover, Plaintiff resides in
23 this District, and she received Defendant's text messages while in District.

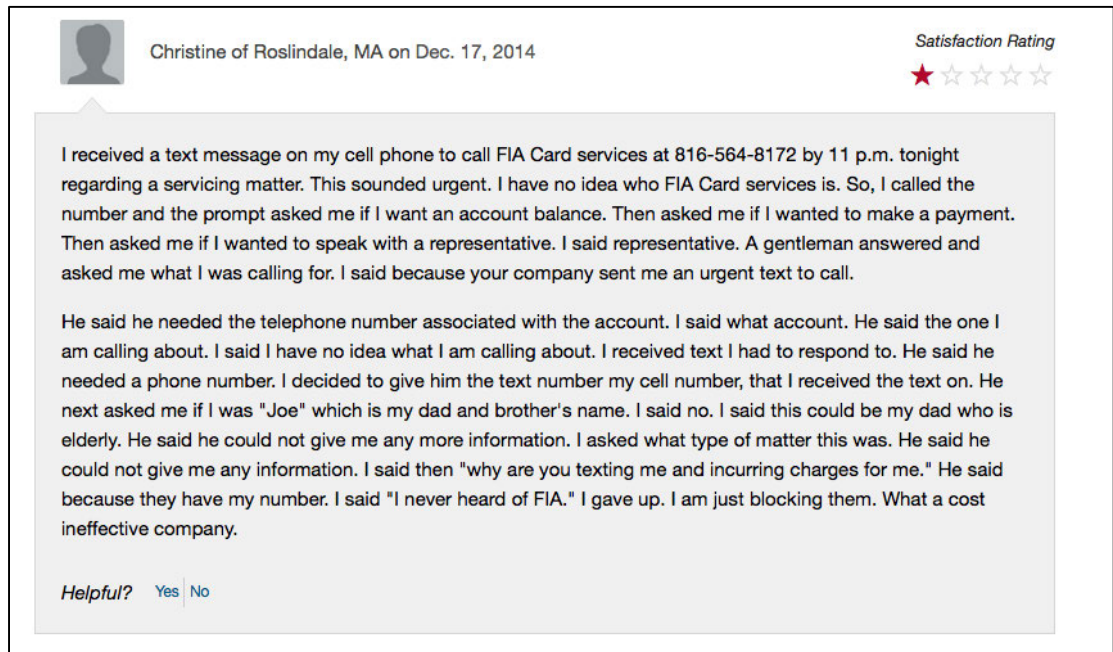
24 **COMMON FACTUAL ALLEGATIONS**

25 12. BOA, a large national bank, services millions of credit card accounts
26 for consumers throughout the United States. It regularly calls, emails, and sends text
27 messages to these consumers.

1 13. But BOA also independently discovers telephone numbers that it
2 associates with consumer accounts, often by using unreliable methods like “skip
3 tracing” or “number trapping.” BOA necessarily lacks prior express consent to call
4 the numbers that it acquires without consumer knowledge or input, and yet it sends
5 text messages to these numbers anyway.

6 14. Worse, BOA sends these texts using equipment that has the capacity to
7 store or produce telephone numbers, and to dial such numbers, *en masse*, without
8 any need for human intervention.

9 15. Not surprisingly, consumers complain. For example, one consumer
10 made the following complaint online:



21
22 **(Figure 1.)**¹

23 16. The TCPA is intended to give consumers control over how and where
24 they receive calls and texts. When BOA independently discovers numbers to call
25 and sends them unwanted text messages without consent, it takes this control away
26 from consumers and violates the spirit and letter of the TCPA.

27 **FACTS SPECIFIC TO PLAINTIFF OLMOS**

28 ¹ Consumer Affairs, *BOA Card Services*, www.consumeraffairs.com/credit_cards/BOA.html (last visited Jan. 29, 2016).

1 17. From 2007 to 2008, Plaintiff Olmos acquired two BOA credit cards.

2 18. Plaintiff stopped making purchases with these cards as of May of 2012,

3 but continued to carry card balances on both accounts until at least October of 2015.

4 19. In July of 2014, Plaintiff got a new cellular telephone number. She

5 never gave BOA this number or her prior express consent to call it.

6 20. On April 29, 2015, BOA sent a text message from 345-22 to Plaintiff's

7 new number that stated, "(Free MSG) Please call FIA Card Services regarding a

8 servicing matter at 1-888-795-6262 by 11pm ET today. Reply STOP to end texts."

9 At the time of this text message, Plaintiff owed money on both of her BOA credit

10 card accounts, and she was behind on her payments.

11 21. Again, on June 11, 2015, BOA sent another text message from 345-22

12 to Plaintiff that stated, "(Free MSG) Please call FIA Card Services regarding a

13 servicing matter at 1-866-564-8172 by 11pm ET today. Reply STOP to end texts."

14 At the time of this text message, Plaintiff owed money on both of her BOA credit

15 card accounts, and she was behind on her payments.

16 22. Other than her two BOA credit card accounts, Plaintiff had no

17 relationship with BOA or its "Card Services" division, and thus had no accounts that

18 might be subject to a "servicing matter," other than those two credit card accounts

19 on which she owed delinquent debts.

20 23. A simple Internet search returns dozens of complaints from consumers

21 who have received the same boilerplate messages from BOA, with only the toll-free

22 telephone number varying from message to message.

23 24. These online complaints indicate that BOA sends these text messages

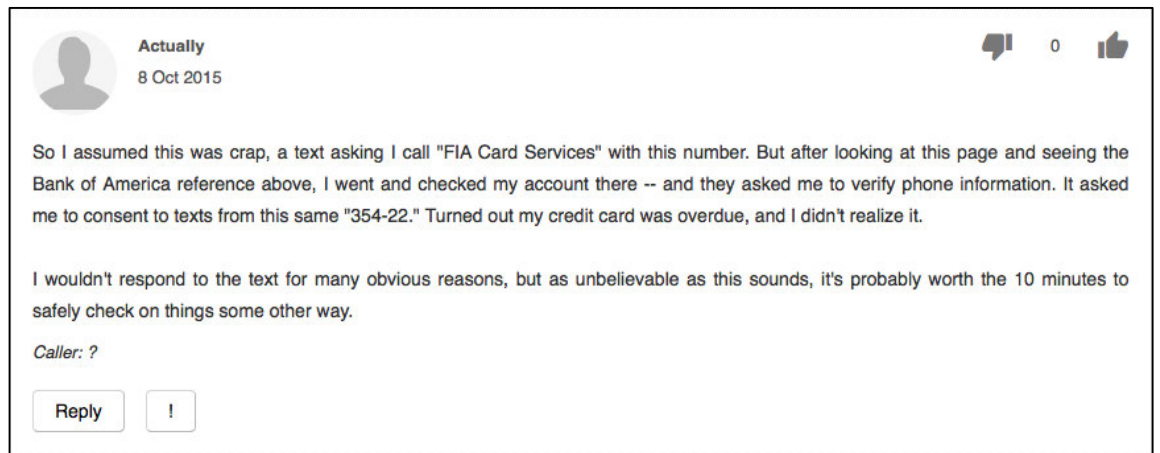
24 in efforts to collect overdue credit card debts, such as those owed by Plaintiff at the

25 time she received such text messages. *See, e.g., Figure 2*, below.

26

27

28



(Figure 2.)²

25. Additionally, the debt collection industry often attempts to collect debts by sending text messages that (1) reference ambiguous “matters,” such as an unspecified “sensitive matter,” and that (2) imply or express urgency, such as by the use of time limitations or the word “URGENT.” Presumably, these techniques improve response rates from debtors who may not otherwise call if they were expressly told that they were being asked to call a debt collector about a delinquent debt. By contrast, telemarketing text messages tend to specify both product and price, as telemarketers can better entice consumers when they expressly signal the existence of some kind of desirable product, opportunity, sale, or discount.

26. For example, the following text message was alleged by the Federal Trade Commission (“FTC”) to constitute an attempt to collect a debt:³

“[LAST NAME], [FIRST NAME], It is URGENT for you to call National Attorney Service regarding a very sensitive matter. [PHONE NUMBER WITH EXTENSION] Case # [CASE NUMBER]”

27. The text messages that BOA sent to Plaintiff, like the debt collection

² 800Notes, available at <http://800notes.com/Phone.aspx/1-877-498-0338> (last accessed June 8, 2016).

³ *United States of America v. National Attorney Collection Services, Inc., et al.*, Case No. 2:13-cv-06212-ODW-VBK (C.D. Cal.) (Aug. 23, 2013) at ¶ 22.

1 text message identified by the FTC, both reference some unspecified “matter” and
2 both imply urgency by imposing sharp deadlines, such as “11pm ET today.” These
3 characteristics are typical of debt collection messages and are not typical of
4 telemarketing text messages or routine servicing text messages.

5 28. Additionally, since Plaintiff never personally provided her current
6 cellular telephone number to BOA, it is likely that BOA acquired her telephone
7 number through skip tracing, a number-acquisition technique commonly used by
8 companies when they are attempting to collect debts. By contrast, companies
9 typically do not perform skip tracing when they merely want to engage in
10 telemarketing or supply routine account notifications.

11 29. The text messages that BOA sent to Plaintiff were attempts to collect
12 on her delinquent BOA credit card debts.

13 30. BOA sent these debt collection text messages to Plaintiff without her
14 prior express consent, using an automatic telephone dialing system.

15 31. BOA knew it used an automatic telephone dialing system to send these
16 text messages, without consent, to a number that Plaintiff never provided, and thus
17 BOA knowingly and repeatedly violated the TCPA.

18 32. As a result of Defendant’s conduct, Plaintiff lost money or property in
19 the form of consumed battery life and diminished use, enjoyment, and utility of her
20 cellular telephone and cellular telephone plan.

21 CLASS ALLEGATIONS

22 33. Plaintiff brings this action pursuant to Federal Rules of Civil Procedure
23 23(b)(2) and 23(b)(3) on behalf of herself and a Class and Subclass of similarly
24 situated individuals, defined as follows:

25 **Class:** All persons in the United States who: (1) received a text
26 message sent by or on behalf of Defendant; (2) at his or her cellular
27 telephone number; and (3) where Defendant had no record of prior
express consent from such individual to send such message.

28 **Subclass:** All members of the Class who reside in California.

1 The following are excluded from the Class and Subclass: (1) any Judge or
2 Magistrate presiding over this action and members of their families; (2) Defendant,
3 Defendant's subsidiaries, parents, successors, predecessors, and any entity in which
4 the Defendant or its parents have a controlling interest and its current or former
5 employees, officers and directors; (3) persons who properly execute and file a
6 timely request for exclusion from the Class and Subclass; (4) persons whose claims
7 in this matter have been finally adjudicated on the merits or otherwise released; (5)
8 Plaintiff's counsel and Defendant's counsel; and (6) the legal representatives,
9 successors, and assigns of any such excluded persons.

10 34. **Numerosity:** The exact number of Class and Subclass members is
11 unknown at this time, but it is clear that individual joinder is impracticable.
12 Defendant has sent texts to thousands of consumers who fall into the definition of
13 the Class and Subclass. Class and Subclass members can be identified through
14 Defendant's records.

15 35. **Typicality:** Plaintiff's claims are typical of the claims of other
16 members of the Class and Subclass, in that Plaintiff and the Class and Subclass
17 members sustained damages arising out of Defendant's uniform wrongful conduct
18 and unsolicited text messaging calls.

19 36. **Adequate Representation:** Plaintiff will fairly and adequately
20 represent and protect the interests of the Class and Subclass and has retained counsel
21 competent and experienced in complex class actions. Plaintiff has no interests
22 antagonistic to those of the Class and Subclass, and Defendant has no defenses
23 unique to Plaintiff.

24 37. **Commonality and Predominance:** There are many questions of law
25 and fact common to the claims of Plaintiff and the Class and Subclass, and those
26 questions predominate over any questions that may affect individual members of the
27 Class and Subclass. Common questions for the Class and Subclass include, but are
28 not necessarily limited to the following:

- 1 (a) Whether Defendant's conduct constitutes a violation of the
2 TCPA;
- 3 (b) Whether the equipment Defendant used to send the text
4 messages in question was an automatic telephone dialing system
5 as contemplated by the TCPA;
- 6 (c) Whether Defendant systematically sent text messages to persons
7 who did not previously provide Defendant with their prior
8 express consent to receive such messages;
- 9 (d) Whether Defendant's telephone calling activities as alleged
10 herein constitute unlawful debt collection practices under the
11 CRA; and
- 12 (e) Whether members of the Class are entitled to treble damages
13 based on the willfulness of Defendant's conduct.

14 38. **Policies Generally Applicable to the Class and Subclass:** This class
15 action is appropriate for certification because Defendant has acted or refused to act
16 on grounds generally applicable to the Class and Subclass as a whole, thereby
17 requiring the Court's imposition of uniform relief to ensure compatible standards of
18 conduct toward the Class and Subclass members and making final injunctive relief
19 appropriate with respect to the Class and Subclass as a whole. Defendant's practices
20 challenged herein apply to and affect each of the Class and Subclass members
21 uniformly. Plaintiff's challenge of those practices hinges on Defendant's conduct
22 with respect to the Class and Subclass as a whole, not on facts or law applicable
23 only to Plaintiff.

24 39. **Superiority:** This case is also appropriate for class certification
25 because class proceedings are superior to all other available methods for the fair and
26 efficient adjudication of this controversy and because joinder of all parties is
27 impracticable. The damages suffered by the individual members of the Class and
28 Subclass will likely be relatively small, especially given the burden and expense of

1 individual prosecution of the complex litigation necessitated by Defendant's actions.
2 Thus, it would be virtually impossible for the individual members of the Class and
3 Subclass to obtain effective relief from Defendant's misconduct. Even if members
4 of the Class and Subclass could sustain such individual litigation, it would still not
5 be preferable to a class action, because individual litigation would increase the delay
6 and expense to all parties due to the complex legal and factual controversies
7 presented in this Complaint. By contrast, a class action presents far fewer
8 management difficulties and provides the benefits of single adjudication, economy
9 of scale, and comprehensive supervision by a single Court. Economies of time,
10 effort and expense will be fostered and uniformity of decisions ensured.

11 **FIRST CAUSE OF ACTION**
12 **Violations of the TCPA, 47 U.S.C. § 227**
13 **(On behalf of Plaintiff and the Class)**

14 40. Plaintiff incorporates by reference the foregoing allegations as if fully
15 set forth herein.

16 41. Defendant sent text messages to Plaintiff's and the Class members'
17 cellular telephone numbers without having prior express consent.

18 42. Defendant sent these text messages using equipment that had the
19 capacity to store or produce telephone numbers to be called using a random or
20 sequential number generator, and to dial such numbers, *en masse*, simultaneously
21 and without human intervention.

22 43. By sending text messages to cellular telephone numbers with an
23 automated telephone dialing system and without prior express consent, Defendant
24 violated 47 U.S.C. § 227(b)(1)(A)(iii).

25 44. As a result of Defendant's unlawful conduct, Plaintiff and the Class
26 suffered invasions of privacy and statutory rights and, under 47 U.S.C.
27 § 227(b)(3)(B), are each entitled to, inter alia, a minimum of \$500 in statutory
28 damages for each such violation of the TCPA.

45. Should the Court determine that Defendant's conduct was willful and

1 knowing, the Court may, pursuant to section 227(b)(3)(C), treble the amount of
2 statutory damages recoverable by Plaintiff and the other members of the Class.

3
4 **SECOND CAUSE OF ACTION**
5 **Violations of the CRA, Cal. Civ. Code §§ 1788 *et seq.***
6 **(On behalf of Plaintiff and the California Subclass)**

7 46. Plaintiff incorporates the foregoing allegations as if fully set forth
8 herein.

9 47. Plaintiff and the members of the California Subclass are natural persons
10 obligated or allegedly obligated to pay debts incurred for personal, family, and/or
11 household purposes, and as such are “persons” owing “consumer debts” within the
12 meaning of Cal. Civ. Code §§ 1788.2(d)–(g).

13 48. Defendant, in the ordinary course of business, regularly engages in acts
14 or practices in connection with the collection of consumer debts, and as such is a
15 “debt collector” within the meaning of Cal. Civ. Code § 1788.2(c).

16 49. Defendant employed unfair or unconscionable means to collect or
17 attempt to collect the consumer debts owed or alleged to be owed by Plaintiff and
18 the California Subclass. Among other things, Defendant violated the TCPA, a
19 federal anti-harassment law, when sending debt collection text messages to Plaintiff
20 and the members of the California Subclass.

21 50. By sending illegal and harassing text messages to collect on debts,
22 Defendant violated, at a minimum, Cal. Civ. Code § 1788.17, by failing to comply
23 with the provisions of Sections 1692b to 1692j of the FDCPA, inclusive. Among
24 other things, Defendant attempted to collect debts through actions that cannot
25 legally be taken, 15 U.S.C. § 1692(e)(5), and while using unfair means, 15 U.S.C.
26 § 1692(f), the natural consequences of which are to harass a person in connection
27 with the collection of a debt, 15 U.S.C. § 1692(d).
28

51. Defendant knew it had acquired Plaintiff's cellular telephone number, without her consent, and yet willfully continued to send her text messages anyway, in knowing and willful violation of the CRA.

52. As a result of Defendant's unlawful conduct, Plaintiff and the California Subclass suffered harms, including invasions of privacy; consumed battery life; and diminished use, enjoyment, and utility of their cellular telephones and cellular plans.

53. Accordingly, pursuant to Cal. Civ. Code §§ 1788.17 and 1788.30, Plaintiff and the California Subclass members are each entitled to, *inter alia*, actual damages, costs, and attorneys' fees, as well as additional statutory damages of up to \$1,000 each.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Tatiana Olmos, individually and on behalf of the Class and Subclass, prays for the following relief:

A. An order certifying the Class and Subclass as defined above, appointing Plaintiff Tatiana Olmos as the representatives of the Class and Subclass, and appointing her counsel as Class Counsel;

B. An award of actual and statutory damages;

C. An injunction requiring Defendant to cease all unsolicited telephone calling activities;

D. A declaratory judgment that Defendant's telephone calling equipment constitutes an automated telephone dialing system under the TCPA;

E. A declaratory judgment that Defendant's use of skip tracing and text messaging violates the TCPA and the CRA;

F. An injunction requiring Defendant to cease all use of automated or computerized telephone calling equipment without obtaining and maintaining records of the call recipients' prior express consent to receive calls made with such equipment;

1 G. An order requiring Defendant to disclose the names of any third-party
2 companies involved in the generation of the text messages alleged herein, along
3 with the terms of any contracts it has with such entities;

4 H. An order requiring Defendant to permanently cease-and-desist from all
5 unlawful conduct as alleged herein, and otherwise protecting the interests of the
6 Class and Subclass;

7 I. An award of reasonable attorneys' fees and costs; and

8 J. Such other and further relief that the Court deems reasonable and just.

9 **JURY DEMAND**

10 Plaintiff requests a trial by jury of all claims that can be so tried.

11 Respectfully submitted,

12 **TATIANA OLMOS** individually and on
13 behalf of all others similarly situated,

14 Dated: June 16, 2016

15 By: s/ J. Dominick Larry
16 One of Plaintiff's Attorneys
Email: nlarry@edelson.com

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CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2016, I served the above and foregoing by causing true and accurate copies of such paper to be filed and transmitted to all counsel o record via the Court’s CM/ECF filing system.

s/ J. Dominick Larry
Email: nlarry@edelson.com